Office of the Attorney General
State of Texas

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ATTORNEY GENERAL

November 4, 1996

The Honorable Ken Armbrister
Chair, Committee on State Affairs
Texas State Senate
P.O. Box 12068
Austin, Texas 78711

Letter Opinion No. 96-122

Re: Whether a person whose land was condemned by the federal government for military purposes may recover the property when the federal government no longer uses the property for those purposes and related questions (RQ-875)

Dear Senator Armbrister:

You ask whether the federal government may retain real property in Texas that the United States acquired by condemnation from a private person when the United States no longer uses the property for the purpose for which it originally condemned the property. In general, the federal government may condemn any land located within the United States for a public use, and once it has acquired the land in fee simple absolute, to convert the land to a different public use. A brief submitted with your letter suggests that this general rule does not apply in Texas because, the brief asserts, the state "retained sovereignty over all lands within its boundaries." Thus, according to the brief, the United States' power to acquire and convert land within the State is limited, particularly by Government Code section 2204.101. We conclude that a former landowner in Texas has no special rights that, in effect, limit the United States' authority to convert land it condemned from one public purpose to another. Consequently, the former landowner may not recover the real property at issue here from the United States.

We believe a brief explanation of the facts will be helpful. In or about 1873 the State of Texas conveyed by patent to the Hawes family various pieces of land on Matagorda Island. In 1940[1] the United States condemned the Hawes land for military

[1]The brief submitted with your letter cites 10 U.S.C. § 1343a as the basis for the United States' condemnation of the real property. We find no section 1343a in title 10, U.S.C., nor do we find in the statutes any indication that section 1343a once existed but has been repealed or moved. We find, however, that 10 U.S.C. § 2663(a) authorizes the secretary of a military department to condemn any interest in land needed for military uses. Prior to 1958, section 2663(a) was located at 50 U.S.C. § 171, which Congress originally enacted in 1917. *See* 10 U.S.C. § 2663 Historical and Revision Notes.

purposes. In 1975, when the United States no longer needed the land for military purposes, the Department of Defense transferred the land to the Department of Interior for use as a wildlife refuge. The Hawes family evidently would like the land, which they consider to be theirs, back.

We begin by discussing the federal government's general power of eminent domain, which power is an attribute of the federal government's sovereignty.[2] At this point, we will ignore the impact, if any, of Government Code section 2204.101, which the brief submitted with your letter raises. The United States Constitution enumerates the federal government's powers, and the government may not exercise any power not listed in the constitution. Thus, the federal government may acquire by condemnation any real property necessary to accomplish the government's constitutional purposes,[3] although the government must compensate the real property owner and provide due process of law.[4]

Furthermore, the federal government's power of eminent domain is superior to a state's right to control land within the state's borders,[5] and a state may not interfere with the federal government's power of eminent domain.[6] Thus, the United States may condemn real property without obtaining the consent of the state within which the property is located.[7] Consequently, the federal government may exercise its power of eminent domain over any real property in the state so long as the United States acts in accordance with its constitutional powers and for a public purpose.[8]

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[2]*Albert Hanson Lumber Co. v. United States*, 261 U.S. 581, 587 (1923); 29A C.J.S. *Eminent Domain* § 20, at 130 (1992).

[3]*United States v. Certain Parcels of Land*, 209 F. Supp. 483 (S.D. Ill. 1962), *aff'd sub nom. United States v. Pleasure Driveway & Park Dist.*, 314 F.2d 825 (8th Cir. 1963) (citing *United States v. Carmack*, 329 U.S. 230 (1946)); *see also* 40 U.S.C. § 257.

[4]29A C.J.S. *Eminent Domain* § 63, at 194 (1992); *see also* 40 U.S.C. § 258a.

[5]*See United States v. Alexander*, 47 F. Supp. 900, 904 (W.D. Va. 1942).

[6]*Certain Parcels of Land*, 209 F. Supp. at 487 (quoting from *United States v. Carmack*, 329 U.S. 230 (1946)); *see also* U.S. CONST. art. VI, cl. 2.

[7]*See Alexander*, 47 F. Supp. at 904 (citing *Kohl v. United States*, 91 U.S. 367, 374 (1875)); *United States v. Eighty Acres of Land*, 26 F. Supp. 315, 321 (E.D. Ill. 1939) (citations omitted).

[8]*See* 29A C.J.S. *Eminent Domain* § 63, at 194 (1992).

Moreover, if the United States has acquired, by condemnation, land for public use in fee simple absolute, the previous landowner retains no rights in the property.[9] The federal government may abandon the public use or devote the land to a different public use without impairing its estate and without vesting a right of reversion in the previous owners.[10] For purposes of this opinion, we assume that the United States acquired the real property about which you ask in fee simple absolute.[11] Thus, without considering Government Code section 2204.101, we would conclude that the United States may retain title to the land it acquired by condemnation, even though the federal government has devoted the land to another public use.[12]

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[9]*United States v. Three Parcels of Land*, 224 F. Supp. 873, 877 (D. Alaska 1963) (quoting with approval 18 AM. JUR. *Eminent Domain* § 124, at 747).

[10]*Id.* (quoting with approval 18 AM. JUR. *Eminent Domain* § 124, at 747). The federal government may take less than a fee simple interest if the United States Attorney General stipulates to exclude an interest in the real property. *Id.* at 876 (quoting *United States v. 10.47 Acres of Land*, 218 F. Supp. 730, 732-33 (D.N.H. 1962)); *see also* 40 U.S.C. § 258f. A condemnor's authority, with respect to the quantum of estate it may acquire, also depends upon the statute conferring the condemnation power. 29A C.J.S. *Eminent Domain* § 417, at 815.

[11]In the brief submitted with your letter, the briefer suggests that the United States did not, in fact, acquire the property in fee simple absolute. Rather, the briefer contends the federal government acquired the land for a period of ten years only:

> Although the original Declaration of Taking stated that the "fee simple absolute" was being taken, a subsequent amendment stated that:
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> the lands described in the original declaration of taking are now taken for the public use of the United States of America for military purposes, in fee simple absolute, excepting all oil, gas and other minerals in and under said land, the land so taken however to be for a period of ten years from November 8, 1940, or for such lesser period as the Secretary of War may determine to be consistent with the public use for which said land is taken, free and clear of all surface easements and rights of occupancy and use of the surface thereof for the purpose of exploring, mining and removing oil, gas and other minerals therefrom.[]
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> Amendment to Declaration of Taking, Civil Action No. 22, Dec. 2, 1941 (emphasis added).

Whether this document, or any other document or fact, gave the United States the real property at issue in fee simple absolute or for a term of years is a question of fact that is not amenable to the opinion process. *See, e.g.*, Attorney General Opinions DM-98 (1992) at 3; H-56 (1973) at 3; M-187 (1968) at 3; O-2911 (1940) at 2. We suggest, however, that the underlined language actually pertains to a period of time in which the owner of mineral rights in and under the land may not use the surface of the land to explore for, mine, or remove such minerals.

[12]The federal government may even trade or sell the property. *See Three Parcels of Land*, 224 F. Supp. at 875 (quoting *Beistline v. City of San Diego*, 256 F.2d 421, 424 (9th Cir. 1968)).

We now must determine whether any federal or state law has created an exception for Texas, such that the United States may not retain title to the land it acquired by condemnation once it has devoted the land to a use other than the original use. We are aware of no such exception. Furthermore, we are unaware of anything in the nature of a patent that would make this land, which the State conveyed by patent to the Hawes family, immune from the federal government's power of eminent domain. We conclude, therefore, that the United States lawfully retains title to the land about which you ask.

The brief submitted with your letter suggests that Congress, in its 1845 Joint Resolution by which the Congress consented to admit Texas into the Union,[13] permitted Texas to retain sovereignty over lands in the state and "require[s] that Texas consent to any acquisition of ownership . . . by the federal government." The brief refers particularly to one of the conditions to which Congress agreed, authorizing the State of Texas to retain and dispose of unappropriated lands within the state's boundaries as the state chooses.[14] The brief contends that, consistent with the 1845 Joint Resolution, the state legislature enacted what is now Government Code section 2204.101, which the brief characterizes as limiting the purposes for which the United States may acquire land in Texas. We need not determine in this opinion whether the state actually adopted what is now Government Code section 2204.101 pursuant to the 1845 Joint Resolution. Indeed, because the brief appears to argue that Government Code section 2204.101, but not the 1845 Joint Resolution, gives landowners in Texas special status, we need not consider the 1845 Joint Resolution further.[15]

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[13]*See* Act approved Mar. 1, 1845, 28th Cong., 2d Sess., 4 Stat. 797 (1845) (Resolution No. 8).

[14]The 1845 Joint Resolution provides that the State of Texas,

> when admitted into the Union, after ceding to the United States all . . . property and means pertaining to the public defense belonging to said republic of Texas, . . . shall . . . retain all the vacant and unappropriated lands lying within its limits, to be applied to the payment of the debts and liabilities of said republic of Texas, and the residue of said lands, after discharging said debts and liabilities, to be disposed of as said State may direct . . . .

[15]The brief appears to argue that the 1845 Joint Resolution of Congress, under which the United States consented to admit Texas into the Union, applies to land after the state has conveyed it by patent to a private landowner. We assume for the moment that the 1845 Joint Resolution remains good law, despite the State's secession from the Union and subsequent readmission as a member of the defeated Confederacy. Even so, the 1845 Joint Resolution permits the state only to "dispose of" vacant and unappropriated property within the state. It does not purport to give the State of Texas power to direct the disposal of real property that the state has conveyed to a private landowner.

We therefore turn to Government Code section 2204.101, which purports to permit the United States to acquire, including acquiring by condemnation, land "in this state" for certain, specified purposes:

> (1) . . . to erect and maintain a lighthouse, fort, military station, magazine, arsenal, dockyard, customhouse, post office, or other necessary public building; or
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> (2) for erecting a lock or dam, straightening a stream by making a cutoff, building a levee, or erecting any other structure or improvement that may become necessary for developing or improving a waterway, river, or harbor of this state.[16]

If we follow the brief's argument, the government's original taking in the 1940s of the Hawes family land comported with what is now Government Code section 2204.101(b)(1) because the land was condemned for military purposes. On the other hand, we understand the brief to argue, the 1975 transfer of the property from the Department of Defense to the Department of the Interior is invalid because the protection of wildlife is not a purpose for which section 2204.101 permits the federal government to acquire land "in this state." Thus, the brief continues, the real property should have reverted to the Hawes family when it was no longer used for a permissible purpose under section 2204.101. The brief appears to assume that Government Code section 2204.101 forbids the federal government to condemn and retain real property for any purpose other than those listed in the statute. We disagree with this assumption.

In our opinion, Government Code section 2204.101 does not limit the purposes for which the federal government may acquire and hold land in Texas. Although subsection (a) states that the legislature "consents" to the United States' acquisition of land "in accordance with this subchapter," it does not state that the legislature refuses consent to land acquired by other methods. Likewise, while subsection (b) lists two purposes for which the United States may acquire land in this state, it does not forbid the United States to acquire land for other purposes. We therefore conclude that Government Code section 2204.101 provides Texas landowners no special exemption from the general rule that the United States may condemn real property for any public purpose and, once acquired in fee simple absolute, may convert the real property to any other public purpose,[17] even if the purpose is not listed in Government Code section 2204.101.

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[16]Gov't Code § 2204.101(b).

[17]The brief submitted with your letter does not claim that the use of the land for wildlife conservation is not a public purpose. Moreover, the brief cites no federal law, and indeed we are unaware of any, under which the United States' acquisition of the land in question for wildlife conservation purposes is invalid.

Finally, the brief appears to assume that the fact that the Hawes family acquired the real property at issue by patent endows the family with special status by which they may recover the real property if the federal government no longer uses the property for a public purpose different from that for which the land originally was condemned. But we are unaware of any law bestowing special status on landowners who acquired their land by patent from the state, whereby the federal government may not convert the use of condemned real property. A patent is a written instrument from the state conveying legal title to real property.[18] While the United States Supreme Court has referred to a patent as "the highest evidence of title,"[19] it accords no special rights on a patentee in regard to the question you ask.

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[18]60 TEX. JUR. 3D *Public Lands* § 94, at 219, 225-26 (1988); *see also* BLACK'S LAW DICTIONARY 1013 (5th ed. 1979). The commissioner of the General Land Office must issue a patent to an applicant who has fully paid for the real property and who has paid all fees that are due on the land. Nat. Res. Code § 51.241. In the brief submitted with your letter, the briefer cites three cases in support of your argument that the federal government may condemn only the use of land held under a patent and only for the purposes listed in Government Code section 2204.101. Furthermore, the brief argues, apparently based partly on these cases, the State of Texas has a duty to defend the Hawes against the federal government's claims on the land they believe should revert to them. We have examined the cases the brief cites: *Moore v. Robbins*, 96 U.S. 530 (1877), and *State v. Bradford*, 50 S.W.2d 1065 (Tex. 1932). Both *Moore* and *Bradford* involve situations in which two parties, one of whom holds a patent, contest ownership to a certain piece of property. *See Moore*, 96 U.S. at 531; *Bradford*, 50 S.W.2d at 1079. In both cases, the courts held for the patentees as opposed to those without patents. *See Moore*, 96 U.S. at 533; *Bradford*, 50 S.W.2d at 1079. The courts stated that once the government has conveyed real property by patent, it may not annul the patent; only a court may take such an action. *Moore*, 96 U.S. at 533; *Bradford*, 50 S.W.2d at 1079. We thus read both *Moore* and *Bradford* to state, as we have stated here, that when a government conveys real property to a person by patent the government conveys full and complete title to the patentee. *See also United States v. Stone*, 2 Wall. 525, 535 (U.S. 1864) (declaring that patent is highest evidence of title). We find nothing in either case suggesting that a patentee has special rights against the federal government when the government seeks to condemn the real property. Nor do we read either case to suggest that the state has a duty to defend a patentee's property against the federal government's claim to it.

[19]*See United States v. Stone*, 69 U.S. 525, 535 (1864).

SUMMARY

The United States may exercise its power of eminent domain over real property that the State of Texas has conveyed by patent, so long as the United States acts in accordance with its constitutional powers and for a public purpose. The United States may retain title to real property that it acquired by the condemnation, even though the federal government has devoted the land to another public use. Neither Government Code section 2204.101 nor the fact that the landowner acquired his or her land by patent from the state accords the landowner special status that would restrict in any way the federal government's power to condemn, or once condemned to convert to another public use, real property.

Yours very truly,

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